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No. 94-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT EICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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October 1994

43 pp

QUESTION PRESENTED

Is the prior consistent statement of a witness admissible as substantive evidence under Fed.R.Evid. 801(d)(1)(B) to rebut a suggestion of recent fabrication, where the prior statement was not made until after the same asserted motive to fabricate arose?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Eick and the United States). Various persons were charged in the same indictment. Only one other went to trial, and none was consolidated on appeal. Petitioner knows of no related cases.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT EICK respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on May 9, 1994, affirming his conviction and sentence on a charge of conspiring to import anabolic steroids.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit, was filed on May 9, 1994. It is Appendix A to this petition. The opinion is not published, but is noted at 27 F.3d 559 (table). There is no published opinion of the district court.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 9, 1994. Appendix B. The Court of Appeals' Order denying petitioner's petition for rehearing with suggestion for rehearing in banc was entered on June 1, 1994. Appx. C. By Order dated August 17, 1994, under Docket No. A-121, Justice Souter granted petitioner's timely filed application for an extension of time within which to file this petition for writ of certiorari, to and including Saturday, October 29, 1994. This petition is filed on or before the first business day thereafter. Rule 13.1, 13.2, 13.4, 30.1 (1990 rev.). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF RULE INVOLVED

Federal Rule of Evidence

801(d)(1)(B) provides:

> **Rule 801. Definitions**
>
> The following definitions apply under this article:
>
> **(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> **(b) Declarant.** A "declarant" is a person who makes a statement.
>
> **(c) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying a the trial or hearing, offered in evidence to prove the truth of the matter asserted.
>
> **(d) Statements which are not hearsay.** A statement is not hearsay if --
>
> > **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or

improper influence or motive ....

STATEMENT OF THE CASE

This petition arises from the conviction after jury trial of Robert Eick, the petitioner, for conspiring and attempting to import, as well as for importing, anabolic steroids without a license.

a. Procedural History

On May 8, 1992, a grand jury in the District of New Jersey charged petitioner along with eight others in a seven-count indictment alleging offenses involving plans to import and distribute anabolic steroids. 21 U.S.C. §§ 952(b) and 960. After a twelve-day jury trial (Ackerman, J.), petitioner was convicted on three counts.

Only petitioner and one co-defendant, Mac Arthur Crudup, went to trial. All of the other defendants pleaded guilty pursuant to cooperation agreements with the government. Of the dozen witnesses who testified at trial, the key witnesses for the government were Anthony Daniele, Glenn Clark and Colin Reid, each of whose plea agreements required their testimony; the sole defense witness for petitioner was Sydney Eick, petitioner's brother, who also was under a cooperation agreement with the government.

On cross-examination, both petitioner's and his co-defendant's attorney attempted to establish that Daniele's testimony constituted a recent fabrication. Specifically, as stated in the Third Circuit's memorandum opinion:

> Counsel for both defendants at this trial challenged Daniele

> on the consistency of his memory. Defendant's counsel questioned why Daniele could name Clark's and Sydney Eick's customers, but not defendant's and suggested that Daniele never knew them. Daniele responded that he could name them if he "would go back in time"; Eick's counsel retorted, "If your memory conveniently goes back in time, like it did for the rest of the stuff you've testified to?" Crudup's counsel was more explicit in his charge of recent fabrication[:] when Daniele said he could not recall whether he had named Crudup's customers to the government, counsel suggested, "[y]ou're telling us [about these customers] for the first time today?"

App. A, at 3.

On rebuttal, the government offered two handwritten statements authored by Daniele to counter the charge of recent fabrication. Neither defense counsel had referred to these statements, which Daniele had prepared the day after he was released on bail, following his indict-

ment and arrest in this case, in cross-examining him. Defense counsel objected immediately to the admission of the statements on the grounds that they were hearsay and inadmissible as prior statements under Rule 801(d)(1)(B) of the Federal Rules of Evidence. The district court overruled the objection and admitted the statements as substantive evidence against petitioner.[1]

On appeal, petitioner sought a new trial based, inter alia, on the district court's improper admission of Daniele's handwritten statements under Rule 801(d)-(1)(B). In an unpublished Memorandum (per Seitz, J., with Sloviter, Ch.J., and Hutchinson, J.), the court below rejected petitioner's claim based on circuit

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1 The statements were contained in Government's Exhibit 24, which the jury was later permitted to take into the jury room during deliberation.

precedent, United States v. Casoni, 950 F.2d 893 (3d Cir. 1991), which it was "unable to distinguish ... on the basis of antecedent motive or lack thereof." App. A, at 4. The Court found that in both Casoni and petitioner's case, "the government offered a prior consistent statement made to the witness's attorney prior to plea bargaining with the government." Id. The court also held that petitioner's argument that the statements were inadmissible as substantive evidence, was "directly countered by the Advisory Committee Notes" to Rule 801(d)(1)(B). Id. at 4.

The court below denied Robert Eick's petition for rehearing on June 1, 1994. App. C.

Statement of Lower Court Jurisdiction Under Rule 14.1(i). The district court's jurisdiction was properly invoked

in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and was timely invoked by Notice of Appeal filed within ten days of the entry of the judgment of sentence. Fed.R.App.P. 4(b).

b. Statement of Facts

The government's three key witnesses each testified on direct examination that they traveled to Europe nine times to purchase steroids and send them back to the United States. After receiving the steroid shipments in the United States, they distributed them independently of one another. Anthony Daniele testified at length concerning Robert Eick's alleged involvement in the importation efforts.

Daniele testified that he and co-defendant Sydney Eick, petitioner's brother, had established the conspiracy to import illegal anabolic steroids from Europe. Later, Sydney Eick persuaded Glenn Clark to join the conspiracy. Tr. 58. Sydney Eick and Clark informed Daniele that they were interested in developing a business in European steroids, dealing directly through Daniele's British source, Colin Reid. Sydney Eick told Daniele that his brother Robert, the petitioner, also wished to become involved.

According to Daniele, Sydney and Robert Eick, Clark and Daniele would all pool their resources to pay for steroids that they wished to obtain from Reid. The order would then be faxed to Reid in England, and Reid obtained the steroids. Robert Eick obtained plane tickets to

England, and one or more of the Americans would travel to England to pay Reid for the steroids, package them, and mail them to addresses of phony offices that they had rented in New Jersey. After the steroids were received at the addresses in the United States, they were separated so that each individual could pick up his order. Each of the four had his own customers. Expenses for travel, shipping, and rental of the office space were divided evenly between the four. Mac Arthur Crudup became Daniele's major customer, purchasing larger quantities to resell.

The nine trips to Europe to obtain steroids occurred between April of 1991 and February 1992. Robert Eick, the petitioner, was the only one of the four alleged co-conspirators who never traveled to Europe, and the only one who

did not obtain a passport for this purpose. Also, Robert Eick did not attend meetings where orders were placed, accounts settled, and trips planned. Sydney Eick always spoke for Robert and did the business he said was Robert's, including paying expenses and saying it was Robert Eick's share. Also, Robert Eick's orders were always in Sydney Eick's possession. Daniele testified that during the conspiracy he started staying at Sydney Eick's house in New Jersey, and learned who many of Sydney Eick's and Clark's customers were, but he could not name Robert Eick's customers.

Daniele said he had conversations with petitioner in which the arrangements for importing steroids and avoiding detection were discussed, and petitioner told Daniele that he had customers in Philadelphia who wanted European

steroids. Once Daniele saw Robert Eick pick up a pile of steroids from Sydney Eick's house and take them away in his car.

In 1992, the government intercepted some packages of steroids and executed a controlled delivery to an address where Daniele mailed steroids to Crudup. After his arrest, Crudup explained his involvement with the conspiracy and Daniele. Daniele was soon arrested. As soon as Daniele was released on bail, he contacted his attorney, who told Daniele to tell him all that Daniele could recall about the importation and distribution of steroids. In response, Daniele wrote extensively on his dealing in steroids and the others with whom he had been involved in importing and distributing them.

Daniele's notes said, inter alia, that "Syd's brother Robert controled [sic] all Phili [sic] with European products. He did not get caught so he has a big stash of products that you know will be sold later." The statement further said that "Robert has customers in the Philadelphia area. I do not know who they are, but he does major business there." A chart portion of the statement depicted petitioner as the distributor in Philadelphia, Sydney Eick as selling in Atco, New Jersey, and Glenn Clark as selling in Sicklerville, New Jersey. The notes further said that "Robert would always give Syd his money[,]" and implicated Sydney Eick in a theft of $250,000. Daniele gave the documents to his attorney, and a day or so later, Daniele's attorney faxed the document to

the government during negotiation of a plea agreement.

Despite his agreement with the government, Sydney Eick testified on behalf of his brother Robert, the petitioner. He explained to the jury that he told Daniele and Clark that petitioner was involved, when actually he was not, as a pretense through which to obtain for himself a larger share of the limited amount of steroids available.

REASON FOR GRANTING THE WRIT

The Circuits are in conflict on the question whether the admissibility of a prior consistent statement under Fed.R. Evid. 801(d)(1)(B) depends upon the prior statement's having been made before the declarant's alleged motive to fabricate arose. This case presents the same question that this Court currently has under consideration in the Tome case.

This Court granted certiorari in Matthew Wayne Tome v. United States, 3 F.3d 342 (10th Cir. 1993), cert. granted, 114 S.Ct. 1048, 127 L.Ed.2d 370 (1994) (No. 93-6892), to resolve the conflict in the Circuits on the question whether a prior consistent statement made after a declarant's motive to fabricate arose rebuts a charge of recent fabrication or improper influence or motive under Fed.R.Evid. 801(d)(1)(B). The Tome case is now awaiting decision after argument. This case presents the same question.

See App. A, Third Circuit Mem. Op. at 2-4 (dismissing petitioner's contentions on this point on the basis of circuit precedent). Therefore, this petition should be held pending the decision in that case; then, certiorari should be granted, and the judgment vacated and remanded so that this case may be resolved by the court below in accordance with the opinion in Tome.

The Third Circuit's resolution of this issue was prejudicial to petitioner in respects that could be resolved favorably to petitioner in Tome, and therefore necessitate that petitioner be retried. In United States v. Casoni, 950 F.2d 893 (3d Cir. 1991), on which the lower court relied in petitioner's case, the court determined that the timing of the motive to fabricate is not a factor in determining admissibility under Rule 801(d)-

(1)(B), thereby agreeing with the Tenth Circuit's decision on the issue which this Court is considering in Tome. 950 F.2d at 904.

The Third Circuit in Casoni also attempted to draw a distinction between the circumstance in which the government has offered the prior consistent statement as substantive evidence and where the evidence is offered only for rehabilitative purposes. Id. at 896-97 & n.2, 905-06; see also Tome, supra, 3 F.3d at 350 n.6. Yet this distinction makes no difference under the plain language of the rule as explained in the Advisory Committee notes. Presumably, this Court will say so in its decision in Tome.

Certain portions of Anthony Daniele's handwritten statements were critically damaging to petitioner's case. These statements undermined the credi-

bility of Sydney Eick's testimony that his brother, the petitioner, had no involvement in the conspiracy, and bolstered the credibility of Daniele's conflicting claims. They were particularly damaging because they were admitted into evidence in written form and allowed to go out with the jury in that form, thus making reliance on them over other evidence more likely. In the jury's probable weighing of the credibility of Sydney Eick's testimony against the testimony of Daniele bolstered by his prior consistent statements, the admission of those statements well may have tipped the balance against petitioner.

Accordingly, the petition for certiorari should be granted after announcement of this Court's decision in Tome. The case must then be remanded to

the court below for further consideration in light of that forthcoming decision.

CONCLUSION

For the foregoing reason, petitioner ROBERT EICK prays that this Court hold his petition for a writ of certiorari pending decision in Tome v. United States, No. 93-6892, and then grant his petition, vacate the judgment below, and remand to the United States Court of Appeals for the Third Circuit for further consideration in light of the opinion rendered by this Court in that case.

Respectfully submitted,

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Attorneys for Petitioner

October 31, 1994.

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5325

UNITED STATES OF AMERICA,

Appellee

v.

ROBERT EICK,

Appellant

APPEAL FROM THE UNITED STATED [sic]
DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Crim. No. 92-00277-4).

District Judge: Honorable Harold A. Ackerman

Argued May 2, 1994

(Filed: May - 9) 1994

BEFORE: SLOVITER, Chief Judge, HUTCHINSON and SEITZ, Circuit Judges.

MEMORANDUM OPINION OF THE COURT

SEITZ, Circuit Judge

Robert Eick ("defendant") appeals his sentence after conviction for conspiring to import, attempting to import, and importing anabolic steroids without a license in violation of 18 U.S.C. §§ 2, 371 and 21 U.S.C. §§ 963, 952(b).

Defendant and eight others were indicted for various offenses revolving around schemes to import and distribute anabolic steroids. Sydney Eick (defendant's brother), Glenn Clark, and Anthony Daniele pled guilty and testified pursuant to cooperation agreements with the government. These three defendants conceded that they had pooled their resources and traveled to Europe on various occasions to purchase steroids and ship them back to the United States. Once the goods arrived in the United

States, these defendants distributed their wares independently of each other. Another defendant, Mac Arthur Crudup, was charged with being part of Daniele's distribution network. Only defendant and Crudup did not reach an agreement with the government and went to trial.

I. Admission of Codefendant's Prior Written Statement

Defendant first complains that the district court erroneously admitted prior written statements by Daniele as substantive evidence against him. During its rebuttal, the government recalled Daniele and introduced two handwritten statements he prepared for his attorney just after being released on bail in this case. The government contends that this was a proper method of rebutting the cross-examination of Daniele under Federal Rule

of Evidence 801(d)(1)(B), which provides that:

> A statement is not hearsay if ... [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive ....

Counsel for both defendants at this trial challenged Daniele on the consistency of his memory. Defendant's counsel questioned why Daniele could name Clark's and Sydney Eick's customers, but not defendant's and suggested that Daniele never knew them. Daniele responded that he could name them if he "would go back in time"; Eick's counsel retorted, "If your memory conveniently goes back in time, like it did for the rest of the stuff you've testified to?" Crudup's

counsel was more explicit in his charge of recent fabrication -- when Daniele said he could not recall whether he had named Crudup's customers to the government, counsel suggested, "[y]ou're just telling us [about these customers] for the first time today?"

Construing these as sufficient charges of recent fabrication, the question is whether admission of the handwritten statements was proper rehabilitation of the witness. Defendant argues that because Daniele wrote the statements after his arrest, they do not predate his motive to fabricate and are therefore incompetent. Both parties argue the significance of United States v. Casoni, 950 F.2d 893 (3d Cir. 1991). In Casoni, there were three relevant statements. The witness's statement at that trial was impeached with the oldest

statement, which he made to his first attorney. The government then offered an intervening statement made to the witness's second attorney to rehabilitate him by showing that he had not created his current story while on the stand. The Casoni court held that it could not say, as a matter of law, that the motive to fabricate predated the statement, so it was not an abuse of discretion to permit the jury to consider the appropriate weight to be given the statement. Id. at 904.

In this appeal, as in Casoni, the government offered a prior consistent statement made to the witness's attorney prior to plea bargaining with the government. We are unable to distinguish Casoni on the basis of antecedent motive or lack thereof.

Defendant further complains that the district court erred by admitting the statements as substantive evidence and not merely for the limited purpose of rehabilitation. This argument is directly countered by the Advisory Committee Notes to this rule of evidence:

> Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

Fed. R. Evid. 801(d)(1)(B) advisory committee note. We endorsed this commentary in Casoni, 950 F.2d at 905, and adhere to it today.

Finally, defendant protests that the admission of two extraneous, prejudicial

statements in the handwritten documents was unjustifiable. Although their inclusion may have been error, we can find no motion for redaction of them. Their admission was not plain error.[1]

II. Severance

Defendant next argues that the district court erred in denying him a separate trial. He contends that because the importation and distribution schemes were separate conspiracies, and he was only alleged to be involved in importation while Crudup was only alleged to involved in distribution, they should not have been tried together.

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[1] Defendant's counsel did move to have page eight of one of the memorandums redacted and the court agreed to excise it. We find no further complaint that statements on pages seven and nine should have been redacted as well.

Kotteakos v. United States, 328 U.S. 750 (1946), is the seminal Supreme Court case on the common trial of multiple conspiracies. In Kotteakos, Simon Brown solicited fraudulent loan applications and submitted them to the National Housing Administration. The loan applicants and recipients formed at least eight separate, although similar, conspiracies. Simon Brown was the only link among the groups, none of whom knew of the others. The Court adopted the government's description of "'separate spokes meeting in a common center,' though ... without the rim of the wheel to enclose the spokes." Id. at 755. Because the government had charged a single conspiracy in the indictment, the variance of multiple conspiracies was fatal and the convictions reversed.

In our case the government charged multiple conspiracies in the indictment, so there is no variance. Furthermore, the organization of the steroid dealers was not that of spokes on a wheel. As the jury interpreted the evidence, there were four defendants (Robert Eick, Sidney Eick, Daniele and Clark) who conspired to export currency and import steroids. Upon importation, each of these defendants had a distribution network and each was aware that the others had distribution channels. Crudup was part of Daniele's distribution network. Our defendants' knowledge distinguishes the Kotteakos defendants who had no idea the others existed.

Defendant's reply brief continues to stress that he and Crudup had never met. This is irrelevant in the law of conspiracy. Indeed, the purpose of conspiracy

law is to hold persons responsible for the greater harm they can cause by acting together. This remains true even when they try to shield themselves from knowledge of the acts of some of their coconspirators. Furthermore, the steroids which Crudup distributed came from the importation conspiracy for which defendant was convicted. We do not understand defendant's argument that these steroids would not have been admissible in a trial against him alone.

We cannot find any abuse of discretion in holding a joint trial.

III. Conclusion

The judgment of the district court will be affirmed.

To the Clerk of the Court:

Please file the foregoing memorandum opinion.

s/ Collins J. Seitz
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5325

UNITED STATES OF AMERICA,

Appellee

v.

ROBERT EICK,

Appellant

APPEAL FROM THE UNITED STATED [sic]
DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Crim. No. 92-00277-4).

District Judge: Honorable Harold A. Ackerman

Argued May 2, 1994

PRESENT: SLOVITER, Chief Judge, HUTCHINSON and SEITZ, Circuit Judges.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued on May 2, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the district court entered May 27, 1993, be and the same is hereby affirmed.

ATTEST:

s/ P. Douglas Sisk
Clerk

May 9 1994

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5325

UNITED STATES OF AMERICA

v.

ROBERT EICK

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH, LEWIS, and SEITZ, Circuit Judges

The petition for rehearing filed by Appellant Robert Eick in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no

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*. Hon. Collins J. Seitz, Senior Circuit Judge, as to panel rehearing only.

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ D. K. Sloviter
Chief Judge

Dated: June 1, 1994